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IN THE

Supreme Court of the United States

October Term, 1955

No. .....

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION; HOME INVESTMENT COMPANY, as representatives of a class of homeowners; TITLE SERVICE COMPANY, as trustee on homeowners' trust deeds; ROBERT H. WALLIS; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BELLFLOWER; and JOHN D. WILLHOIT,

Petitioners,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER and WILLIAM K. DIVERS, as members of the Home Loan Bank Board; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners[1] pray that writs of certiorari issue to review the orders and judgments hereafter described, entitled:

No. 14,378

In the United States Court of Appeals for the Ninth Circuit

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER AND WILLIAM K. DIVERS, AS MEMBERS OF THE HOME LOAN BANK BOARD; A. V. AMMANN; GEORGE K. BRAMLEY; AND THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, A FEDERAL CORPORATION,

Petitioners,

vs.

HONORABLE PEIRSON M. HALL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA; THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA; MALLONEE, *et al.*,

Respondents,

and respectfully represent as follows:

[1]Petitioners are the real parties in interest, except said Honorable Judge and Court, who are represented by separate counsel.

Opinions Below.

The opinion of the Court of Appeals in these original mandamus and injunction proceedings before it, will be found in 225 F. 2d Adv. 349, and filed herewith in slip opinion form as Appendix B.

The opinions of the United States District Court, against which said mandamus, etc., were issued, will be found in 117 Fed. Supp. 259 and 122 Fed. Supp. 401, and also at 960.[2] References herein to such opinions are to the Appendices A and B and I and II filed herewith.

Jurisdiction.

Jurisdiction of the Supreme Court is invoked upon the grounds that the Court of Appeals has:

(a) repealed laws Congress enacted, enforced laws Congress repealed, and enacted laws Congress refused to pass;

(b) enforced as *res judicata* of the merits decisions based wholly on absence of jurisdiction; and

(c) enforced as *res judicata* matters discussed in prior opinions, but never made a part of any prior judgment or mandate.

The orders, judgments and original writs of mandamus and injunction of the Court of Appeals were entered July 18, 1955. Timely rehearing petitions were denied October 12, 1955.

Petitioners believe the statutory provisions conferring Supreme Court jurisdiction to review by certiorari, are 28 U. S. C., §§1254 and 2101.

Questions Presented.

12,000,000 savings depositors and homeowners are the mutual owners of 1,640 Federal Savings and Loan Associations which are members of Federal Home Loan Banks throughout the Nation. Debts of the Associations to the Banks exceed $867,478,000. The charters of all said Associations and Banks, as well as the notes evi-

[2]See appendix and record reference at end hereof.

dencing the debts, each contain express reservations for Congressional amendments of applicable statutes:

1. Can the Court of Appeals nullify such power of Congress by holding remedial amendments of statutes are "purely prospective" and do not apply to existing Banks, Associations, or their debts?

2. Can original writs of mandamus and injunction be substituted by the Court of Appeals for untried actions and unheard appeals, and thereby preclude 30,000 Federal savings depositors and 8,000 homeowners from defending *on the merits* against secret foreclosure of $7,000,000 of their savings and homes?

3. Can 1952-53 opinions of the Court of Appeals, dismissing pleadings without trial for "lack of jurisdiction," now be held *"res judicata"* of the untried merits, and thereby invalidate subsequent amendments by Congress in 1954 expressly conferring jurisdiction on the United States District Courts to decide the yet pending and untried issues?

Statutes Involved.

(a) Power of Congress to confer jurisdiction on United States Courts. United States Constitution, Article I, §8, clauses 9 and 18:

> "The Congress shall have power
>
> "[cl. 9] To constitute Tribunals inferior to the supreme court;
>
> "[cl. 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . ."

(b) The Housing Act of 1954, 68 Stat. 590, Sections 501, 502, 503, and 818, conferring jurisdiction on United States Courts over the Federal Savings System by repealing and amending parts of:

(1) The Federal Savings and Loan Association creative sections of the Home Owners' Loan Act of 1933, 48 Stat. 128, Title 12, U. S. C., §1461, *et seq.;*

(2) The Federal Savings and Loan Insurance Corporation creative sections of the National Housing Act, 48 Stat. 1246, Title 12, U. S. C., §1724, *et seq.;*

(3) The advances to members creative sections of the Federal Home Loan Bank Act, 47 Stat. 725, Title 12, U. S. C., §1421, *et seq.*

The "provisions involved are lengthy." Therefore their pertinent text is set forth at pages 9 to 34 of Appendix A herewith.

Statement.

1. 38,000 Savings Depositors and Homeowners Are Threatened With Secret Foreclosure.

30,000 Federal Savings Association depositors are immediately threatened by respondents with secret foreclosure, prior to trial and without redemption, of $7,000,000 of their deposited savings.[3]

8,000 Federal Savings Association homeowner borrowers are also threatened with foreclosure of $7,000,000 of claimed liens upon deeds of trust upon their respective homes.

2. Secret Foreclosure Threatened, Despite Tender of Payment in Full.

Petitioner Federal Savings Association has twice tendered full payment of the $7,000,000 denied debt which respondents yet threaten to secretly foreclose. Such tenders were made by cashiers' check and cash, to be de-

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[3]At oral hearing of a stay application before Mr. Justice Douglas, respondents, in 1955, for the first time gave assurances that secret foreclosure of petitioners' savings would be temporarily postponed. However such postponement is *only* pending Supreme Court review. Respondents have repeatedly refused to give any assurances to the trial Court that they would postpone secret foreclosure of petitioners' savings until court trial of respondents' own foreclosure action 13979. Respondents, as plaintiffs in this action, asked the Court to decide the amount, *if any* due, to declare the extent and enforceability of respondents' claimed lien, and *thereafter* to judicially foreclose.

posited in Court, pending court adjudication of the amount, if any, due on the denied $7,000,000 debt.

The first tender of over $6,300,000 was made in 1948 in an action filed by petitioners.[4] The second tender of over $7,000,000 was made in respondents' own Court foreclosure action,[5] filed by one of them as plaintiff, asking Court decision of the amount due on, and Court foreclosure of, said denied debt.

Both tenders were rejected. Rejection of such tenders stopped accrual of further interest, discharged all security, and precluded forclosure.[6]

3. Terms of Denied Debt Permit Secret Foreclosure.

The denied debt is evidenced by 4 separate Conservator's notes. Each of the 4 alleged notes purport to authorize respondents to secretly foreclose petitioners' savings, without notice, at an unknown time, and place of sale, and without any right of redemption. Thereby respondents would be the only bidders at their own secret foreclosure sale, from which they had excluded petitioners and all independent bidders. The purported notes read in part:

> ". . . payee may, . . . sell . . . the whole . . . collateral security, without any relief to the maker from any valuation or appraisement laws . . . at any public or private sale, without demand, advertisement or notice of the time or place of sale or of adjournments thereof, all of which are hereby expressly waived. The maker further waives any and all equity or right of redemption, whether before or after sale hereunder, and agrees that upon such sale the payee may become the purchaser . . .

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[4]See footnote 9 for resume of action 5421.

[5]See footnote 10 for résumé of action 13979.

[6]*Calif. Civil Code*, §1504; *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415 (1918); *Walker v. Houston*, 215 Cal. 742, 12 P. 2d 952 (1932).

free from any such right or equity of redemption. . . ."[7]

4. Petitioners Have Meritorious, Untried Defenses to Respondents' Threatened Foreclosure.

Petitioners have answered and cross-complained, defending against said foreclosure.[8]

Petitioners did not execute, nor did they receive the consideration for, the 4 alleged notes, naming San Francisco Bank as payee, and which aggregate $6,300,000 face, (alleged accrued interest exceeds $700,000; the combined total is over $7,000,000). Respondents are fully secured by U. S. Bonds and cash. (See Appx. A, p. 91.)

Petitioners untried and undecided defenses include:

(a) Absence and/or failure of consideration;

(b) Violation by respondents of applicable statutes and regulations in creation by respondent Conservator Ammann, in favor of respondent San Francisco Bank, of the denied $7,000,000 debt, alleged to be a liability of petitioner;

(c) Tenders made by petitioners and rejected by respondents, which discharged all liens and preclude foreclosure; and

(d) Expiration of statutes of limitation.

5. Petitioners Have for 9 Years Sought, and Respondents Have Resisted Court Adjudication of the Amount, and Validity, of the Denied Debt.

The $7,000,000 denied debt was purportedly created in 1946-47 by respondent Ammann (as purported Federal Conservator for petitioner Federal Savings Association). He executed 4 Conservator's notes in favor of respondent San Francisco Bank as payee. He also purported to assign and pledge $14,000,000 of petitioners' U. S.

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[7]See appendix I, pgs. 133 to 136 for text of notes.

[8]See footnote 10 for résumé of respondents foreclosure action.

bearer bonds and homeowners' notes and trust deeds, as alleged security for said 4 Conservator's notes.

Petitioners have constantly, since 1946, denied the validity and enforceability of said $7,000,000 alleged debt. No Court trial has yet been held.[9]

After continuously denying the jurisdiction of the Federal Courts to decide such issues, respondents have herein reversed themselves and persuaded the Court of Appeals in this case to decide such issues before, and without, any decision by any trial Court, Federal or State.[10]

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[9]Action 5421 was filed in 1946 in the U. S. District Court, Southern District of California, by petitioners Mallonee, *et al.*, as the Shareholders' Protective Committee, on behalf of the then 16,000 savings depositors of petitioner Federal Savings Association. Such action sought, among other things, return of $26,000,000 of petitioners' seized savings, consisting of U. S. bearer bonds, uncounted cash and negotiable securities, seized by respondent Ammann. Ammann had been appointed Conservator for petitioner Federal Savings Association without notice or hearing, and Petitioners allege maliciously and without cause. Respondent Ammann had refused to give any receipt for, or to permit any independent counting or audit of petitioners' $26,000,000 of uncounted cash and securities.

The action also sought to prevent creation of the denied $7,000,000 debt. When said debt was created in defiance of a restraining order of the U. S. Court in said action, pleadings were amended to seek cancellation of said debt as fraudulent, and declaratory relief as to the existence of said debt.

Petitioners claimed the seizures were unconstitutional. In *Mallonee v. Fahey,* 68 F. Supp. 418, a three-judge court agreed. In 1947, the Supreme Court in *Fahey v. Mallonee,* 332 U. S. 245 reversed and held the Acts of Congress constitutional. But, in *Ex parte Fahey,* 332 U. S. 258, refused prohibition, mandamus, and injunction, then sought by respondents to prevent trial in the U. S. District Court.

In 1948, after the Supreme Court decisions, respondents removed the Conservator and restored petitioner Association, and part, *but not all,* of its seized assets to its founding management from whom it had been seized. By administrative order No. 388, respondents ordered the removed Conservator to account with the District Court. The first accounting was rejected by the Court; the second attempt to account is pending, subject to petitioners' multi-million dollar objections as yet untried by the Court.

[10]Respondents have objected to the jurisdiction of the U. S. Courts in *every* action, including their own foreclosure action

In 1948, when petitioners first tender of $6,300,000 was rejected by respondents, the U. S. District Court ordered respondents to deposit in Court, pending trial, the 4 conservator's notes and all alleged security. Said security was $5,300,000 face of U. S. bearer bonds and $8,500,000 face of homeowners' notes and trust deeds. Such $8,500,000 was the aggregate face of 4,236 separate notes and 3,944 separate trust deeds of petitioners' 8,000 homeowner borrowers.

Respondents complied with said order, deposited said notes and security in Court, and never appealed therefrom.

6. Savings Depositors' and Homeowners' Meritorious Defenses Against Secret Foreclosure Have Never Been Heard or Decided by Any Court.

Appeals taken by respondents from other orders in 1949, had resulted in 1952-53 opinions of the Court of Appeals, ordering dismissal "for lack of jurisdiction" of various of petitioners' pleadings and actions.[11]

Such dismissals were without trial or decision of the amount, or the validity, of said denied $7,000,000 debt.

The mandate of the Court of Appeals to the District Court in 1953, required:

(a) The return from the Clerk of said District Court to respondents San Francisco Bank of the 4 Conservator's notes and petitioners' $7,000,000 of U. S. Government bearer bonds and cash, the alleged security for said notes.

13979, filed by them as plaintiffs in 1952, 6 years after petitioners, in 1946, commenced action 5421. Action 13979 was filed in California State Courts and removed to U. S. District Court. It sought declaratory relief, adjudicating the amount, if any, due, and the validity of the lien respondents claimed on said $7,000,000 denied debt. Action 13979 has never been before the Supreme Court nor the Court of Appeals on any previous appeals or certiorari. Their present original proceedings in the Court of Appeals for writs of mandamus and injunction were filed by respondents to compel dismissal or remand of all pending actions, and to enjoin petitioners' defenses against secret foreclosure.

[11] *Home Loan Bank Board v. Mallonee*, 196 F. 2d 336; *Fahey v. O'Melveny & Myers*, 200 F. 2d 420; *Fahey v. Calverley*, 208 F. 2d 197.

(b) Dismissal of various pleadings, *but not* the action 5421.

The appeals upon which said mandate had been issued, were from actions 5421 and 5678 only. Respondents' own foreclosure action 13979 (commenced by them as plaintiffs 6 years after actions 5421-5678) had never been consolidated therewith, nor had it then been appealed. *It has never been the subject of any previous Supreme Court decision or certiorari.*

Respondents insisted before the U. S. District Court that such dismissals "for lack of jurisdiction" decided the *merits,* not only of the pleadings so dismissed, but also of respondents' own separate untried foreclosure action 13979.

In disposing of this contention the U. S. District Court found (Appx. I, p. 90, 122 F. Supp. 401, 444):

> ". . . it would be repugnant to all ideas of justice and law, that the appellate court intended by mandate in one case, (5421-5678), to summarily decide the merits of another case, (13979), not before them on appeal, and no phase of which had been decided by the trial court so as to posture it for appeal, and thus to preclude any defense by Long Beach Association to action 13979. It is also repugnant to the express terms of the order of that court, which . . . expressly permitted the San Francisco Bank to prosecute, and the Long Beach Association to appear in, answer, defend and participate in action 13979 . . ."

Such finding remains unreversed and unmodified by the Court of Appeals.

7. United States District Court Prevents Secret Foreclosure Without Redemption, and Quiets Homeowners' Titles.

Upon receipt by the U. S. District Court of the 1953 mandate of the Court of Appeals, petitioners made their

second $7,000,000 tender, by cash and cashiers' check, in respondents' own foreclosure action 13979. Upon rejection of this second tender by respondents, the District Court sought assurances from respondents that no secret foreclosure would be held pending Court trial of respondents' own foreclosure action. Respondents refused.

This is in striking contrast to the assurances to Mr. Justice Douglas that no secret foreclosure would be held pending disposition of this matter by this Court.[12]

After such refusal the U. S. District Court made its order in action 13979 directing the Clerk to retain in Court, petitioners' $7,000,000 of bearer bonds and cash, pending Court trial of respondents' own foreclosure action. The District Court found (Appx. I, p. 185, 122 F. Supp. 960, 997):

> "That by the failure and refusal of the Federal Home Loan Bank of San Francisco to execute a receipt . . . that such bonds and cash shall be held as collateral security only, and not otherwise, and are subject to any final judgment in the action commenced by them, now bearing No. 13979, and by various statements by their counsel in Court, and from all proceedings had herein and in related matters, Federal Home Loan Bank of San Francisco threatens that unless the equity powers of this Court are exercised it will, or will attempt to, apply the said cash and interest coupons on said U. S. government bonds, received by it upon said conservator's notes, and sell at private sale, without notice and without the right of redemption under claimed rights so to do, the said $5,300,000 Government bonds. . . ."

This finding is also unreversed by the Court of Appeals.

During the course of certiorari applications to the U. S. Supreme Court in 1953, respondents had represented

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[12]See footnote 3 hereof.

that no homeowners' titles were threatened with foreclosure.

Thereafter in 1954, respondent San Francisco Bank recorded in the Los Angeles County, California, Recorder's Office, and filed in its own foreclosure action 13979, a written disclaimer in the nature of a quit claim to all of petitioners' 8,000 homeowner borrowers.

On filing of such disclaimer, the U. S. District Court entered a summary judgment, quieting the titles of all said homeowners against any threatened foreclosure by respondent San Francisco Bank.

Notwithstanding its disclaimer, respondent San Francisco Bank resisted the quiet title judgment in the District Court, and appealed such quiet title judgment to the Court of Appeals. Respondents also appealed from the order retaining petitioners' $7,000,000 of U. S. Bearer bonds and cash in Court pending trial of respondents' own foreclosure action. By the 1955 Court of Appeals writ of mandamus, all pleadings upon which said quiet title judgments were based, are dismissed.

8. Respondents Ask Court of Appeals for Original Writs of Mandamus and Injunction to Compel Secret Foreclosure.

On June 4, 1954, respondents filed their original petition in the Court of Appeals for mandamus against Honorable Peirson M. Hall, U. S. District Judge, who had quieted the homeowners' titles, and prevented the secret foreclosure.

Respondents also sought original writs of injunction to prohibit petitioners from defending against said secret foreclosure, and to compel dismissal of the pleadings upon which said homeowners' quiet title judgments were made.

The Court of Appeals issued an order to show cause and amended order to show cause, which were served

only upon said U. S. District Judge. Copies were mailed to some, but not all, of counsel for petitioners.

No personal service was ever made on any of petitioners individually.

9. Congress Removes Basis for Court of Appeals Original Writs by Vesting Jurisdiction in the U. S. District Court.

Petitioners and respondents, and all liabilities, obligations, debts, and claims of any against the others, were created by, and arose from, the creation of the Federal Savings System by Congress.

Petitioner Federal Savings Association derives its existence, and its 30,000 depositors and 8,000 borrowers obtain their rights from, Federal Home Loan Bank law.[13]

Respondents Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, Federal Home Loan Bank of San Francisco, *et al.*, all are created by, and their existence continues under, Federal Home Loan Bank law.

On August 2, 1954, during the pendency of this litigation, both in the U. S. District Court and in the Court of Appeals, the Housing Act of 1954, enacted by Congress, became effective. By its terms, it repealed, amended, and superseded all other law. It reads in part:

> "ACT CONTROLLING.
>
> "SEC. 818. Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling."

On that date there was pending, undecided, before the Court of Appeals, these original proceedings for original writs of mandamus and injunction, sought by respondents

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[13] *Federal Home Loan Bank Act*, Title 12 U. S. C. §§1422, *et seq.*; *Home Owners' Loan Act of 1933*, Title 12 U. S. C. §§1462-1464, *et seq.*; *National Housing Act*, Title 12 U. S. C. §§1724-1725, *et seq.*

against petitioners.[14] There was also pending in the U. S. District Court, respondents' $7,000,000 foreclosure action (13979) brought by respondents as plaintiffs in 1952, against petitioners as defendants, in which other petitioners were cross-defendants.

There also were pending various other U. S. District Court actions between various of the petitioners and repondents. All such actions involved issues arising from the creation of petitioners and respondents under the *Federal Home Loan Bank Act, Home Owners' Loan Act,* and *National Housing Act, supra,* and the obligations, liabilities, and duties of savings depositors and homeowner borrowers, in petitioner Federal Savings Association under said Acts.

Jurisdiction of the U. S. Courts over such litigation, under said Acts of Congress, prior to 1954, was the predominant issue, both in said U. S. District Court and in 1952-1953 decisions of the Court of Appeals.[15]

By the Housing Act of 1954, Congress repealed and amended all prior law, and enacted Section 503 of the Housing Act of 1954, which reads in part:

"TITLE V—HOME LOAN BANK BOARD."

". . . The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by

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[14]Petitions for such original writs were filed with the Court of Appeals June 4, 1954, *before* enactment of the Housing Act of 1954 (effective August 2, 1954), were argued February 28, 1955, and decided July 18, 1955, *after* the Housing Act of 1954.

[15]*Home Loan Bank Board v. Mallonee,* 196 F. 2d 336; *Fahey v. O'Melveny & Myers,* 200 F. 2d 420; *Fahey v. Calverley,* 208 F. 2d 197.

registered mail, to the Home Loan Bank Board, Washington, District of Columbia."

Section 501 of the Housing Act of 1954, rendered respondent Federal Savings and Loan Insurance Corporation similarly subject to both jurisdiction and venue of the District Court in this litigation.[16]

Further, Section 503 reads in part:

". . . the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders . . ."

New actions[17] were thereafter filed in the District Court by petitioners, together with applications in the already pending litigation, to apply these remedial, curative and procedural amendments, enacted by Congress in its exercise of an express reserved legislative power of amendment.

10. Congressional Power to Amend Statutes Was Reserved in Notes Involved Herein and in All Corporate Charters of All Federal Savings and Loan Associations and Federal Home Loan Banks Throughout the United States.

Such power of amendment was reserved[18] in the ex-

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[16]See appendix A, p. 9 for text of Sec. 501 of the Housing Act of 1954.

[17]Nos. 17,133, 17,152, 17,153, 17,154. Such actions seek, among other things, accounting, declaratory relief, and return of petitioners' U. S. bonds and cash, alleged collateral for said $7,000,000 denied debt.

[18]It also existed without such reservations, as part of the sovereign power of Congress. *Gelfert v. National City Bank*, 313 U. S. 221; *Home Bldg. & L. Assoc. v. Blaisdell*, 290 U. S. 398, 435; *Veix v. Sixth Ward Bldg. & Loan Assoc. of Newark*, 310 U. S. 32.

press terms of each of the Conservator's notes[19] for $7,000,000, sought to be foreclosed, and in the charters of respondent San Francisco Bank,[20] and petitioner Federal Savings Association.[21]

11. Respondents Asked, and Congress Refused, to Exempt This Litigation From the Housing Act of 1954.

Respondents sought from Congress an exception expressly exempting this then pending litigation and its subject matter, including the original writs sought from the Court of Appeals, from the effect of the Housing Act of 1954. During progress of the amendments through Congress, the Senate enacted such an amendment, but the House refused to consent to such exception.

A letter[22] was written by B. T. Fitzpatrick, General Counsel of the Housing and Home Finance Agency, to the Senate Committee on Banking and Currency, on June 17, 1954. This letter reads in part:

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[19]Each of the four alleged Conservator's notes (totaling $7,000,000) contains a provision reading:

"The rights, powers, and privileges conferred upon the Federal Home Loan Bank Board and/or member banks by the 'Federal Home Loan Bank Act,' approved July 22, 1932, as in force at the date of the execution hereof *and/or as hereafter amended,* are hereby made a part of the provisions of this note . . ." (Emphasis added) (Appx. I, p. 136).

[20]The charter of Federal Home Loan Bank of San Francisco reads in part:

"6. This Certificate is made for the purpose of carrying out the provisions of the Act of Congress, known and cited as the Federal Home Loan Bank Act, approved July 22, 1932, *and such other acts as may be passed by Congress amending or supplementing* the said Federal Home Loan Bank Act, in so far as it or they may be applicable to the Federal Home Loan Bank . . ." (Emphasis added).

[21]The charter of petitioner Long Beach Association, Sec. 3, Objects and powers, reads in part:

". . . The Association shall have such powers . . . in conformity with the Home Owners' Loan Act of 1933 and all laws of the United States as they now are, *or as they may hereafter be amended,* . . ." (Emphasis added).

[22]See appendix A, p. 1 for copy of letter.

"There is but one pending suit to which the provision would be applicable, *i. e.*, the California litigation, . . . The Court of Appeals for the Ninth Circuit has issued an order to the District Court and the litigants to show cause why that litigation should not be permanently enjoined. . . ."

After receipt of this letter, the House and Senate Joint Conference Committee rejected the amendments, the Senate receded and both House and Senate repassed the Housing Act of 1954, *with the Senate amendments deleted.*[23]

12. The Court of Appeals Enacted Laws Congress Refused to Pass.

The Housing Act became effective August 2, 1954. Thereafter petitioners applied to the United States District Court for leave to amend the pleadings in the pending actions to show jurisdiction, pursuant to said Housing Act and to 28 U. S. C. §1653.[24]

The District Court had not yet considered or acted upon such pending applications to amend. The Court of Appeals in July 1955, almost one year after the effective date of the Housing Act of 1954, nullified such Congres-

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[23]During the enactment of the Housing Act of 1954, at the urging of counsel for the respondents' parent, the Housing and Home Finance Agency, the Senate enacted, and later withdrew, amendments. To Section 501, the Senate added the language:

"'. . . Provided, That the provisions hereof relating to service of process shall not be applicable to any pending court action or suit or to any action or suit involving the subject matter or part thereof, of such pending action or suit.'";

To Section 503, the Senate added the language:

"'. . . Nothing in this subsection relating to jurisdiction, venue, service of process or suability of the Board shall be applicable to any pending court action, or suit, or to any action, or suit involving the subject matter or part thereof, of such pending action or suit.' . . ."

(100 Cong. Rec. 6886-6887).

[24]Text of 28 U. S. C. §1653 is:

"1653. Amendment of pleadings to show jurisdiction

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

sional amendments and said they could have no application to the pending litigation, despite the Congressional mandate to the contrary. The Court of Appeals said (Slip Op. p. 40, Appx. B):

> ". . . the language in question should and must be regarded as purely *prospective* in its application . . ."

13. The Court of Appeals Repeals Statutes Congress Has Enacted.

The Housing Act of 1954 became effective August 2, 1954. *After* the effective date of said Act, and prior to the July 1955 decision of the Court of Appeals, petitioners filed new actions in the United States District Court,[25] pursuant to jurisdiction thereby conferred. Said Housing Act says in part:

> ". . . the provisions of this Act shall be controlling."[26]

Petitioners new actions were filed under, and in express reliance on, the jurisdiction conferred on the District Court thereby. Yet the Court of Appeals ruled that the filing of such actions "constitutes an abuse of the process of said District Court" (Slip Op. p. 71, Appx. B), and enjoined petitioners from exercise of their statutory rights, expressly conferred by the Acts of Congress.

The Court of Appeals thus directly repealed statutes enacted by Congress.

Reasons for Granting the Writ.

A. Congressional Control Over Federal Savings System Nullified.

The charters of 1,640[27] Federal Savings and Loan Associations, 11 Federal Home Loan Banks, and the $867,-

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[25]Numbered therein, 17133, 17152, 17153, and 17154.

[26]Section 818, Housing Act of 1954, Appendix A, p. 17.

[27]All figures are approximate. Figures are from reports to Congress and publications of Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, and similar sources.

478,000 of notes and debts of such associations to such banks, all contain express reservations that they shall exist and be governed by Acts of Congress:[28]

(1) "as hereafter amended" (terms of notes);

(2) "as they may hereafter be amended" (charters of Federal Savings and Loan Associations); and

(3) "such other acts as may be passed by Congress amending or supplementing" (charters of Federal Home Loan Banks).

By such reserved power to make future amendments, Congressional changes in law are instantaneously operative upon all existing assets and liabilities of all such Federal Savings and Loan Associations, Federal Banks, and their over 12,000,000 depositors and borrowers, and over $16,000,000,000 of deposited savings and loans on homes.

Pursuant to such reserved power of amendment, Congress, by the Housing Act of 1954, has subjected every member of the Federal savings system, including respondent Home Loan Bank Board, the 11 Federal Home Loan Banks, the Federal Savings and Loan Insurance Corporation, and all 1,640 Federal Savings Associations, to the jurisdiction of the United States Courts in every United States Judicial District wherein is situated the home office of any Federal Savings Association.

The effect of such changes in law, made under a reserved power to amend, is long settled. In *United States Mortgage Co. v. Matthews,* 293 U. S. 232, 237:

> ". . . the words employed [the laws of Maryland or any amendments or additions thereto] seem to us sufficient to embrace the amendments and additions thereafter made . . ."

See also: *Helmholz v. Horst,* 294 Fed. 417 (C. A. 6, (1924)); *White v. United States,* 270 U. S. 175.

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[28]See page 15 hereof for full text of reservations in charters and notes.

Even without such express reservations in the charters, notes, etc., of power to amend, legislative control over public savings institutions and foreclosures has been held immediately applicable to prior contracts.[29]

But the Court of Appeals refuses to apply such amendments to existing causes of action or to pending litigation.

B. Power of Congress Over Jurisdiction of Federal Courts Is Repudiated by Court of Appeals.

The power of Congress to confer or withdraw jurisdiction of the United States Courts is absolute.[30] The power includes pending, as well as future, actions in all such Courts.

Absence of jurisdiction in 1946-53 does not preclude Congress from conferring jurisdiction in 1954. It is long settled that:

> "No one has a vested right in any given mode of procedure."[31]

Nor can prior decisions, based on a *then* absence of jurisdiction, be *res judicata* to prevent Congress remedying the defect by later conferring jurisdiction.

Unless pending actions and existing controversies are *expressly* mentioned, and excepted, they are included in every action of Congress conferring, or removing, jurisdiction of the Federal Courts.

Such rule has special application when the jurisdiction conferred is over federal agencies. *Missouri Pacific Railway Company v. United States,* 189 U. S. 274, 282:

> ". . . no hearing was had before the Commission concerning the matters of fact complained of, and therefore no finding of fact whatever was made

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[29]See footnote 18 hereof.

[30]U. S. Constitution, Art. I, §8, cl. 9 and 18.

[31]*Ex parte Collett,* 337 U. S. 55, 72; *Crane v. Hahlo,* 258 U. S. 142, 147.

by the Commission . . . the question . . . is whether, under such circumstances, the . . . United States . . . were authorized to institute this suit.

"Testing this question by the law which was in force at the time when the suit was begun and when it was decided below, we are of the opinion that the authority to bring the suit did not exist.

"But this is not the case under the law as it now exists, since power to prosecute a suit like the one now under consideration is expressly conferred by an act of Congress adopted since this cause was argued at bar, . . .

". . . by the . . . act conflicting laws are repealed, it is provided, 'but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law [italics ours] *and as modified by the provisions of this act.*' We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, . . . [Order] remanding the cause to the circuit court for such further proceedings as may be consistent with the Act . . . as subsequently amended. . . ."[32]

In *Ex Parte Collett,* 337 U. S. 55, 71:

". . . Petitioner suggests that his action may not be transferred because it was instituted prior to the effective date of the Code. Clearly, §1404 (a) is a remedial provision applicable to pending actions . . ."

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[32]The Housing Act of 1954 repealing clause is even broader. Sec. 818 reads:

". . . Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling."

In *Smallwood v. Gallardo,* 275 U. S. 56, 61:

> ". . . To apply the statute to present suits is not to give it retrospective effect but to take it literally and to carry out the policy that it embodies . . ."

In *The Baltimore and Potomac Railroad Company v. Grant,* 98 U. S. 398, 403:

> ". . . There is nothing in the statute which indicates any intention to make a difference between suits begun and those not begun . . . if it had been the intention to confine the operation . . . to judgments thereafter rendered or to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, . . ."[33]

As already made crystal clear herein,[34] respondents expressly and directly asked, and Congress refused, just such an exception.

Congress even struck from the law the exceptions which respondents persuaded the Senate to pass. Respondents exceptions were rejected by the House.

Yet the Court of Appeals has read back into the law and enforced by injunctions, the very provisions which Congress refused and removed.

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[33]The Courts of Appeal agree. *Federal Reserve Bank of Richmond v. Kalin,* 77 F. 2d 50, 51 (C. A. 4, 1935):

> ". . . It is clear that the grant of jurisdiction given by the statute applies to causes of action in existence at the time of its passage as well as to those subsequently arising. 'Statutes relating to practice and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may have arisen before.' [citing authorities]."

In Re Monsen, 74 F. 2d 411, 412 (C. A. 7, 1934); *Silurian Oil Co. v. Essley,* 54 F. 2d 43, 47 (C. A. 10, 1932); *Beatty v. U. S.,* 191 F. 2d 317, 320 (C. A. 8, 1951); *Bowles v. Strickland,* 151 F. 2d 419, 420 (C. A. 5, 1945); *Bowles v. Miller,* 151 F. 2d 992, 993 (C. A. 10, 1945).

[34]See pages 15 to 17 and 22 to 27 hereof.

C. Intent of Congress to Confer Jurisdiction on Federal Courts Over This Litigation, Is Demonstrated by Both Legislative History and Plain Words.

Congress subjected respondents to the jurisdiction of "the United States district court for the district where the home office of such association is located,". Such jurisdiction included "any matter under . . . any . . . law or regulation . . ."

As was said in *Ex Parte Collett*, 337 U. S. 55, 58:

> ". . . The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from 'any civil action.' "

Further at 61:

> ". . . there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history . . .' . . ."[35]

and in *Unexcelled Chemical Corp. v. U. S. A.*, 345 U. S. 59, 64:

> ". . . when Congress, . . . has used language which plainly brings a subject matter into a statute, its word is final . . ."

In the applicable provisions of the Housing Act of 1954 there is no ambiguity. Further, its legislative history leaves no room for any doubt or construction by the Court of Appeals to remove this litigation from the plain, clear, and direct words of Congress.

The legislative history of Title V, "HOME LOAN BANK BOARD," Sections 501, 502, 503 and 818, of the Housing Act of 1954, extends over an 8-year period.

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[35]Citing: *Gemsco, Inc. v. Walling*, 324 U. S. 244, 260; *Packard Motor Car Co. v. National Labor Relations Bd.*, 330 U. S. 485, 492; *United States v. American Trucking Assoc.*, 310 U. S. 534, 543, and cases there cited.

As was said in *Ex Parte Collett,* 337 U. S. 55, 65:

> "This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code . . ."

In the instant case, Congress in 1946 first gave its attention to this litigation and the need it demonstrated to amend Home Loan Bank law.

The House "Select Committee to Investigate Acts of Executive Agencies Beyond the Scope of Their Authority," on June 12, 13, 14, 1946, heard 23 witnesses, took 274 pages of oral testimony, and received hundreds of pages of written statements and exhibits,[36]—*all* concerning this litigation and its subject matter.

The Committee, in 1946, filed its 27 page unanimous report condemning the seizures which precipitated this litigation. Among the recommendations of such report were:

> "(4) That the Commissioner revoke the order appointing a conservator for the Federal Savings and Loan Association of Long Beach and restore the assets and affairs of the association to its duly elected management, *and render a proper accounting* for the same, as expeditiously as is consistent with judicial determination of the questions at issue . . .
>
> "(5) That the appropriate committees of Congress give consideration to the necessity (if, in the opinion of such committees, the necessity exists) of amending the Federal Home Loan Bank Act in the following particulars: . . .
>
> "(c) Prohibiting the agency from appointing conservators for any member association, except under specific and well-defined limitations." (Emphasis added.)[37]

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[36]H. R. Rep. No. 2659, 79th Cong., 2d Sess., Pg. 27.
[37]See Appendix A, pp. 5-8.

Nor did the attention of Congress cease with such report. Four years later petitioners had been unable to compel respondents to account, and were now threatened with a second seizure. The "Special Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Eighty-First Congress, Second Session" then commenced its "Investigation of the Home Loan Bank Board." This was the second Congressional investigation of respondents, their seizures, and obstructive tactics in this litigation.

During 1950-51-52, 36 days of oral testimony was taken by said Committee. 50 witnesses were heard, 2,133 pages of oral testimony, and thousands of pages of written statements and exhibits received.

The witnesses before both Congressional Committees included the then heads of respondent agencies and banks, their general counsel, and numerous of their staff. All testimony before both Congressional Committees referred to this very litigation, its causes or legislation required by it.

Before the first Committee, respondents' predecessor testified:

> "Mr. Fahey: Suit . . . entered in the Federal court in an effort to regain control of this institution . . . has set up the false and hypocritical cry that I acted in this matter in reprisal . . . It is assumed that the courts will presently determine the justification for our action."[38]

Yet for 9 years, all respondents have denied all jurisdiction of the United States Courts, even over their own $7,000,000 foreclosure action, filed by them as plaintiffs.

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[38]Page 105 of "Hearings Before The Special Committee To Investigate Executive Agencies, House of Representatives, Seventy-Ninth Congress, Second Session, Pursuant to H. Res. 88, Part 7, Complaints of Federal Home Loan Bank of Los Angeles and Federal Savings and Loan Association of Long Beach Against The Federal Home Loan Bank Administration."

Honorable J. Alston Adams, then a member of respondent Bank Board, and now President of respondent Federal Home Loan Bank of San Francisco, testified, referring to the seizures,[39] as follows:

> ". . . the acts were arbitrary and capricious and vindictive . . ."

The pendency of this litigation was urged repeatedly upon both Committees as a reason for withholding Congressional action. Perhaps as a result, the second Committee made no report, but, in November 1952, the Court of Appeals in this litigation, in *Fahey v. O'Melveny & Myers,* 200 F. 2d 420, at 479, said:

> ". . . Nor has Congress since amended the Home Loan Bank Act to provide for such a review. The simplest kind of an amendment would have achieved such a result . . ."

Thereafter the House bill, which became the Housing Act of 1954, was introduced in Congress.

That Congress specifically intended the all inclusive language of such remedial legislation to apply to this then pending litigation is conclusively established by the progress of such legislation through the Congress. The Act was first passed by the House.[40] It then went to the Senate. When passed by the Senate, Section 501 was amended to include the language:

> "'. . . Provided, That the provisions hereof relating to service of process shall not be applicable any pending court action or suit or to any action or suit involving the subject matter or part thereof, of such pending action or suit.'";

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[39]Page 259, "Hearings Before A Special Subcommittee Of The Committee On Expenditures In The Executive Departments, House of Representatives, Eighty-First Congress, Second Session, and Eighty-Second Congress, First and Second Sessions, Investigation Of The Home Loan Bank Board."

[40]100 Cong. Rec. 4490.

To Section 503, the Senate added the language:

> "'. . . Nothing in this subsection relating to jurisdiction, venue, service of process or suability of the Board shall be applicable to any pending court action, or suit, or to any action, or suit involving the subject matter, or part thereof, of such pending action or suit.' . . ." (100 Cong. Rec. 6886-6887).

A letter was written by B. T. Fitzpatrick, General Counsel of the Housing and Home Finance Agency, to the Senate Committee on Banking and Currency, on June 17, 1954.[41] This letter read in part:

> "There is but one pending suit to which the provision would be applicable, *i. e.,* the California litigation, . . ."

After receipt of this letter, the House and Senate Joint Conference Committee[42] rejected the above quoted amendments, the Senate receded, and both House and Senate repassed the Housing Act of 1954, *with the Senate amendments deleted.*

It is fundamental that provisions which Congress considered, but refused to enact, cannot thereafter be made into statutory law by Court interpretation.

Prior amendments by Congress to this same section of Home Loan Bank law were considered in *Hopkins Federal Savings and Loan v. Cleary,* 296 U. S. 315. The language of the Court demonstrates that such Congressional action is given great weight. At page 334 the Court said:

> ". . . The form chosen by its draftsman for the statute here involved takes on a new significance when read in the revealing light of *the forms that were rejected.*

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[41]See Appx. A, p. 1 for copy of letter.

[42]"Congress legislates in its committee rooms." *Ex Parte Collett,* 337 U. S. 55, 66.

"We think the light is so strong as to flood whatever places in the statute might otherwise be dark . . . " (Emphasis added.)

In *United States v. National City Lines,* 337 U. S. 78, 82:

". . . this change in the law must have been known to the Government in time for it to have addressed the protests which we have heard to the Congress . . ."

Again at 84:

". . . a protest was made which Congress disregarded. Neither alternative would offer the slightest justification for overriding the unequivocal words . . . and the legislative history which establishes that Congress indeed meant what it said."[43]

The protests made here by the respondents to the Congress were not only disregarded, but expressly rejected.

D. The Court of Appeals Here Turns Its Prior Decisions Based Upon Lack of Jurisdiction, Into Final Decisions of the Merits.

The Court of Appeals rests its original "writ of mandamus" and "injunction" against *"re*-litigation', wholly on finality of its prior appellate decisions[44] as *"res judicata"* of *untried* merits. But all three decisions were based upon *lack* of jurisdiction.

In *Fahey v. Calverley,* 208 F. 2d 197, at 199, the Court

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[43]See also: *St. Joe Paper Co. v. Atlantic C. L. R. Co.,* 347 U. S. 298, 316, 330; *H. Rouw Company v. Crivella,* 310 U. S. 612, 613; *Cudahy Packing Company v. Holland,* 315 U. S. 357, 366, 367; *Milk Wagon D. Union v. Lake Valley Farm Products,* 311 U. S. 91, 103.

[44]*Home Loan Bank Board v. Mallonee,* 196 F. 2d 336 (cert. den. without opinion, 345 U. S. 952); *Fahey v. O'Melveny & Myers,* 200 F. 2d 420 (cert. den. without opinion, 345 U. S. 952); *Fahey v. Calverley, Receiver,* 208 F. 2d 197 (cert. den. without opinion, 347 U. S. 955).

of Appeals summarized its own prior holdings by saying:

> ". . . in Home Loan Bank Board v. Mallonee, 196 F. 2d 336, and Fahey v. O'Melveny & Myers, 200 F. 2d 420; cert. denied 345 U. S. 952, rehearing denied 345 U. S. 978. This Court there determined that the District Court was without jurisdiction of the subject matter of either of said consolidated actions . . ."

It is basic that the jurisdiction of a U. S. Court of Appeals is solely derivative and appellate.

An appellate Court cannot decide the *merits* of a case the trial Court is without jurisdiction to hear. In *United States of America v. Corrick,* 298 U. S. 435, 440:

> ". . . While the District Court lacked jurisdiction we have jurisdiction on appeal, *not of the merits* but merely for the purpose of correcting the error of the lower court in entertaining the suit . . ." (Emphasis added.)

This rule is universal.[45]

Yet the Court of Appeals now "perpetually" enjoins petitioner from *defending,* in a Court with jurisdiction expressly given by Congress, the merits it would not permit heard in petitioners' prior actions as plaintiff.

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[45] *S. S. Kresge Co. v. Amsler,* 99 F. 2d 503 (C. A. 8, 1938), at 507:

> "The lower court being without jurisdiction to determine the issues on the merits, this court is likewise without jurisdiction to do so, and we pretermit any discussion of them . . ."

In *Cramer v. Phoenix, Etc., Co.,* 91 F. 2d 141 (C. A. 8, 1937) at 144:

> ". . . The jurisdiction of the appellate court ends when it finds want of jurisdiction in the lower court . . ."

Piedmont & N. R. Co. v. United States, 280 U. S. 469, 478; *Smallwood v. Gallardo,* 275 U. S. 56, 62; *Smallwood v. Santani,* 275 U. S. 62, 63; *Stratton v. St. Louis Southwestern Railway Company,* 282 U. S. 10, 18; *Alabama v. United States,* 282 U. S. 502, 506.

E. Prior Decisions Made "Without Jurisdiction of the Subject Matter" Are Now Held by the Court of Appeals Herein to Be Res Judicata of the Merits.

If the United States District Court was without jurisdiction, the Court of Appeals is equally powerless.

Yet, the Court of Appeals now holds that in its prior opinions, on appeals which resulted *only* in dismissal for lack of jurisdiction, it has decided and made *res judicata, without trial,* the merits it would not permit the District Court to either hear or try. In *Murray v. Pocatello,* 226 U. S. 318, 324, speaking for a unanimous Supreme Court, Justice Holmes said:

> ". . . Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were . . ."

In *In re N. L. R. B.,* 304 U. S. 486, 494:

> ". . . if it [the Court] finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith . . ."

This rule is universal.[46]

F. Matters Never Contained in Any Previous Mandate or Judgment, Are Now Held Res Judicata and Compelled by Mandamus.

No previous mandate or judgment of the Court of Appeals had ever directed or adjudged dismissal of action 5421. Instead the combined[47] mandate directed dismissal

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[46]See also: *Hughes v. U. S.,* 71 U. S. 232, 237; *Smith v. McNeal,* 109 U. S. 426, 430; *Detroit Trust Co. v. Dunitz,* 59 F. 2d 905, 906 (C. A. 6, 1932); *Meyer v. Kansas City So. Ry. Co.,* 84 F. 2d 411, 415 (C. A. 2, 1936); *Gensinger v. C. I. R.,* 208 F. 2d 576, 579 (C. A. 9, 1953).

[47]Two cases, 5421 and 5678, were consolidated in the U. S. District Court. In 1950, two separate appeals, 12511 and 12591, were taken. The appeals were never consolidated. After separate decisions and opinions (196 F. 2d 336 and 200 F. 2d 420) in each appeal, joint certiorari applications were made and denied. Thereafter, a single *combined* mandate was issued from the Court of Appeals enforcing both its separate judgments on appeal.

of action 5678, and only certain enumerated pleadings in action 5421. *Action 5421 was not ordered dismissed.*

Respondents were authors of the 1953 mandate. They drafted and submitted it. The Court of Appeals adopted and issued it.

In respondents' oppositions to certiorari in 1954 (Nos. 656, 659, Oct. T. 1953), they attached as exhibits to their oppositions in No. 656, both the 1953 mandate [as Ex. A] and the "Order dismissing pleadings in accordance with mandate" [as Ex. B], signed by the District Court December 11, 1953. On page 5 of No. 656 respondents state:

> "The Court of Appeals thereupon issued its mandate, dated May 21, 1953, remanding the proceedings to the District Court with directions to dismiss the principal pleadings, . . .[8] Pursuant to this mandate, the District Court, on December 11, 1953, dismissed the pleadings . . ."

Footnote 8 reads:

> "8. The Court of Appeals did not direct the dismissal of the entire proceedings but only of certain pleadings. The reason for this procedure was apparently that a number of home owners who sought to discharge their mortgages during the pendency of the conservatorship had been drawn into this maelstrom of proceedings and had been awarded—unnecessarily, as we believe—judgments directing reconveyances by the trustee. Rather than cast doubt upon the validity of these decrees, the mandate was drawn in such terms as to exempt them from its operation . . ."

On page 3 of No. 659 respondents state:

> "Thereafter, the mandate issued by the Court of Appeals . . . directed the dismissal of the principal pleadings in the Long Beach case . . . and the complete dismissal of the Los Angeles action.[2]"

"2. While the District Court complied with the mandate as far as the Long Beach action was concerned, . . . (*cf. Mallonee v. Fahey*, 117 F. Supp. 259, 270-273)."

Respondents thus represented to this Court in 1954 that the mandate of which they were the authors had been "complied with", without dismissal of action 5421!

No application to recall, amend, or expand the mandate was ever made.[48]

The Housing Act of 1954 became effective August 2, 1954. Action 5421 was then still pending before the District Court. Many other pleadings not among those ordered dismissed yet remained.

The requirements of the mandate for dismissal of the *enumerated* pleadings, but not the action 5421, had been meticulously carried out by the District Court. It said (*Mallonee v. Fahey,* 117 F. Supp. 259, 273):

> ". . . On the face of the mandate it becomes apparent that the appellate court intended a *different result in 5421* than they did in *5678* inasmuch as they used the plain language, 'dismiss *civil action 5678*' and, *'dismiss the following pleadings* in civil action *5421*' . . ."

Respondents cited the above language to this Court as compliance with the 1953 mandate. Thereafter petitioners made application to the District Court pursuant to 28 U. S. C. §1653[49] to amend the pleadings in yet pending action 5421 to exercise jurisdiction expressly conferred by the 1954 Housing Act amendments.[50]

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[48]An unrecalled mandate cannot be expanded to include matters never therein directed. See *Briggs v. Pennsylvania R. Co.,* 334 U. S. 304, 306.

[49]28 U. S. C. §1653 reads:

> *"§1653. Amendment of pleadings to show jurisdiction*
> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

Also in *Levinson v. Deupree,* 345 U. S. 648, 652:

> "We hold that federal practice controls the question whether the administrator, . . . should be permitted to amend . . . And we hold that the administrator should be permitted to do so . . ."

[50]See Appx. A, p. 12 for text of Section 503, Housing Act of 1954.

Before the District Court could even consider such applications to amend, the Court of Appeals issued its original mandamus, commanding "forthwith" dismissal of action 5421, and ALL pleadings therein.

Such dismissal was ordered by the Court of Appeals in July 1955, a year after the effective date of the Housing Act of 1954, and after respondents' representations to the Supreme Court that "the District Court complied with the mandate as far as the Long Beach action was concerned,".

The 1955 Original Writ of Mandamus was based upon dismissals discussed, but not ordered, in 1952-53 opinions and never incorporated into ANY previous judgment or mandate.

In *Rogers v. Hill,* 289 U. S. 582, 587:

> ". . . The opinion of the Circuit Court of Appeals did indeed deal with matters affecting the merits but the decree did not extend beyond mere reversal of the order from which the appeal was taken . . . The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests . . . [citing authorities]
>
> "Moreover, if the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose. But, assuming it included the opinion, the mandate would not prevent the district court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues and take other proceedings . . ."

Yet, the Court of Appeals now commands "forthwith" dismissal of action 5421 as *"res judicata"* although it was never previously ordered dismissed.

G. Administrative Remedies Have Been Exhausted.

In 1946 respondents told the Congressional Investigating Committee, referring to this litigation:

> "Suit has been entered in the Federal court . . . It is assumed that the courts will presently determine the justification for our action."[51]

But in Court, respondents claimed immunity from all jurisdiction of the Federal Courts. For 9 years respondents have insisted "exhaustion of administrative hearings" was a prerequisite to Court jurisdiction, and in 1952, the Court of Appeals so held.

Thereafter, in 1953, and again in 1955, petitioner Association applied to respondent Bank Board for administrative action to protect $7,000,000 of its savings deposits from secret foreclosure without trial or redemption. Both times respondent Bank Board refused such action.[52]

Petitioner asked respondent Bank Board for an administrative hearing[53] to consider orders to protect petitioners' $7,000,000 of deposited savings from secret foreclosure.

Respondent Bank Board refused to grant any administrative hearing or even to consider any such order. It ruled:

> ". . . said petition is hereby denied for the reason that the Federal Home Loan Bank Board is without authority to grant the relief sought . . ."

Thus for 9 years respondents have whipsawed petitioners

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[51]See footnote 38 hereof for reference to Congressional Committee hearings.

[52]In 1953, it refused to make any order, but said "The Board . . . requests that the Bank not dispose of this security without first conferring with the Board." Despite such "request" respondent San Francisco Bank yet threatened secret foreclosure.

[53]Petitioners application, made to respondent Bank Board August 9, 1955, read in part:

> "WHEREFORE, petitioner prays: . . .
>
> "3. That hearings, upon notice, at times and places of reasonable convenience to the parties, be held by, or under the direction of, said Home Loan Bank Board, . . ."

between Congress, the Courts, and administrative hearings. Respondents have denied the authority of whatever body they were before at the moment. Congress was told ". . . the courts will . . . determine the justification for our action." The Courts were told respondents' "administrative hearings" alone had authority. Thereafter respondents denied their own administrative authority.

Congress, disgusted at this evasion, removed "exhaustion of administrative remedies" as a prerequisite to applying "to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief . . . [and provided] . . . said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders." (Housing Act of 1954, Sec. 503.)

Respondent Conservator was removed in 1948. No hearing to consider removal of a Conservator already removed, is now possible.

Except when it is appointing a conservator, receiver, etc., respondent Bank Board now cannot even schedule any administrative hearings until *after* expiration of the 30 day period specified in Section 503 of the Housing Act, for *first* applying to the Court for "a declaratory judgment and an injunction or other relief."[54]

"Administrative remedies" denied because respondent "Board is without authority to grant the relief", cannot preclude petitioners from defending in Federal Court against the secret foreclosures respondent Bank Board refused to hear or halt.

H. Court of Appeals Substitutes Original Mandamus and Injunction for Undecided Trials and Appeals.

Actions are pending in the District Court unheard and untried.[55] Such actions involve the *merits* of issues never

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[54]See Appendix A, p. 12, for full text of Sec. 503, Housing Act of 1954.

[55]See footnote 10 for résumé of action 13979, and footnote 17 for actions 17,133, 17,152, 17,153 and 17,154.

previously before this Court, or the Court of Appeals. One of the unheard issues of such actions is jurisdiction expressly conferred by Congress on the U. S. *District* Court in 1954, *after,* and as a result of, 1952-53 decisions of the Court of Appeals.

Among the untried actions is respondents' own foreclosure action 13979, commenced by them as plaintiffs to foreclose $7,000,000 of petitioners' 30,000 savings depositors and the homes of 8,000 of petitioners' homeowners.

Respondents have taken two appeals in their own foreclosure action.[56]

Said appeals also present issues never previously before the Court of Appeals, or the Supreme Court, on any prior appeals. They are pending, docketed, unbriefed, and unargued. Yet the Court of Appeals has, by its original writs of mandamus and injunction, decided both said untried actions and unheard appeals in advance of trial or hearing. It has reversed the order of the United States District Court preventing secret foreclosure and retaining petitioners' $7,000,000 of bearer bonds and cash in Court pending trial. It has also reversed the quiet title judgments protecting the 8,000 homeowners against foreclosure.

Such reversals are accomplished by original writ of mandamus commanding: (1) The Clerk of the District Court to defy the unreversed order of the District Court to retain petitioners' $7,000,000 pending trial, and on the contrary to pay it over "forthwith" to respondent San Francisco Bank, thereby exposing it to secret foreclosure before trial; and (2) the United States District Judge

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[56](1)Appeal 14,587 from the order of the U. S. District Court quieting petitioners' 8,000 homeowners' titles to their respective homes against respondents' threatened foreclosure; and (2) Appeal 14,632 from the order of the U. S. District Court retaining petitioners' $7,000,000 of U. S. bearer bonds and cash in Court, and preventing secret foreclosure thereof, pending trial.

to dismiss, untried, petitioners' homeowners and savings depositors defenses to secret foreclosure.

Substitution of mandamus for trial and appeal is contrary to the law of this case, established by this Court in *Ex Parte Fahey,* 332 U. S. 258, 259:

> "Mandamus, prohibition and injunction against judges are drastic . . .
>
> "We find nothing in this case to warrant their use . . ."

It is also contrary to an unbroken line of decisions of this Court that mandamus cannot be substituted for trial and appeal.[57]

Conclusion.

Trial on the merits has never been held, yet the Court of Appeals:

1. Has erroneously decided important questions of Federal law which have not been, but should be, settled by this Court; *i. e.,* has denied immediate application of the remedial amendments of the Housing Act of 1954 to all Federal Savings and Loan Associations and Federal Home Loan Banks, notwithstanding Congressional power to so amend expressly reserved in the charters and debt obligations of all said Associations and Banks.

2. Has erroneously decided Federal questions in conflict with applicable decisions of this Court; *i. e.,* has repudiated the power of Congress to make procedural amendments conferring jurisdiction on Federal Courts

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[57] *Bankers Life & Cas. Co. v. Holland,* 346 U. S. 379, 383:

> ". . . whatever may be done without the writ may not be done with it . . ."
>
> "We adhere to the language of this Court in *Ex parte* Fahey . . ."

See also: *Roche v. Evaporated Milk Ass'n,* 319 U. S. 21, 30; *United States v. Rice,* 327 U. S. 742; *Ex Parte Park Square Auto, etc.,* 244 U. S. 412; *Ex Parte Harding,* 219 U. S. 363, 372; *Ex Parte Rowland,* 104 U. S. 604; *Ex Parte Roe,* 234 U. S. 70.

immediately apply to pending actions and existing causes of action.

3. Has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; *i. e.* (a) has erroneously made prior decisions based wholly on absence of jurisdiction, *res judicata* to preclude trial of unheard merits, (b) has erroneously substituted Original Writs of Mandamus and Injunction to decide, ***without trial,*** the merits of actions pending untried in the District Court, and to decide without hearing, appeals pending unheard in said Court of Appeals—all contrary to law and to *Ex Parte Fahey,* 332 U. S. 258, the law of this case in this litigation.

Certiorari should therefore be granted.

Respectfully submitted,

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ADDENDA.

Appendix Reference.

A combined appendix is filed herewith, bound as separate volumes A and B. Also 9 copies of appendices I and II, as filed with the Court of Appeals, are also filed herewith. Appendix references herein are to such A or B or I or II.

As these were *original* proceedings in the Court of Appeals there was no printed record. Nor was any testimony taken.

Opinions Below.

United States District Court Opinions:

117 F. Supp. 259, is pages 35 to 98 of Appendix A, filed herewith.

122 F. Supp. 401, is pages 1 to 152 of Appendix I before Court of Appeals;

122 F. Supp. 960, is pages 189 to 258 and 301 to 382 of Appendix II, and pages 170 to 188 of Appendix I before Court of Appeals.

Court of Appeals Opinions.

225 F. 2d Adv. 349 in slip opinion form, is Appendix B filed herewith.